

**UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF THE INTERIOR
MINERALS MANAGEMENT SERVICE**

Open and Nondiscriminatory Movement)
of Oil and Gas as Required by the)
Outer Continental Shelf Lands Act)

RIN 1010-AD17

**COMMENTS OF
ENTERPRISE PRODUCTS PARTNERS L.P.**

Enterprise Products Partners L.P. (“Enterprise”) hereby responds to the Proposed Rule issued by the Minerals Management Service (“MMS”) in the above-referenced proceeding and published in the Federal Register on April 6, 2007.¹ In the Proposed Rule, the MMS requested comments on a series of proposed regulations that, if promulgated, would establish a complaint process for shippers transporting oil or gas production from Federal leases on the Outer Continental Shelf (“OCS”) to follow if they believe that they have been denied open and nondiscriminatory access to pipelines operating on the OCS. As explained more fully below, Enterprise submits that the Proposed Rule generally strikes the appropriate balance between not imposing unnecessary burdens upon pipelines operating on the OCS and providing a defined regulatory process for those shippers who claim that they have been denied open and nondiscriminatory access to an OCS pipeline.

I. EXECUTIVE SUMMARY

The goal of the MMS in promulgating regulations to ensure that pipeline companies provide open and non-discriminatory access for shippers transporting oil or gas on the OCS should be to establish sufficient regulatory oversight to curb discriminatory conduct, if any, without imposing unnecessary and burdensome requirements upon pipelines operating on the

¹ Proposed Rule, 72 Fed. Reg. 17047 (April 6, 2007).

OCS. Today's OCS market is a robust and competitive environment that has encouraged significant capital investment in new infrastructure to support the development of critical new oil and gas supplies. The complaint-based regulatory approach proposed by MMS in this docket strikes the appropriate balance by avoiding regulatory interference in the market place while ensuring that any party that has been denied open and nondiscriminatory access has a defined complaint procedure to which it can resort.

The MMS proposes a complaint procedure for shippers that will provide for a meaningful process and relief where appropriate, without adversely affecting, through the imposition of burdensome and unnecessary regulations, the robust and competitive environment that currently exists on the OCS. The MMS was correct to conclude that "'open access' and 'nondiscriminatory access' are fact-specific terms and their application is best left to be determined during adjudication of individual situations."² The highly competitive OCS market is in large part a product of a regulatory environment that has provided sophisticated business parties the flexibility needed to structure mutually satisfactory commercial arrangements.

Enterprise also supports the MMS's proposal to require shippers to "quantify the financial impact or burden (if any) created as a result of the action or inaction."³ Requiring shippers to quantify the financial impact of an alleged violation of the MMS's regulations hopefully will lead to the filing of only *bona fide* complaints, thereby minimizing the likelihood of frivolous complaints that might be lodged simply as a commercial bargaining tool or as a means to extract proprietary information. In a similar vein, Enterprise submits that MMS should adopt strict standards about whom may be required to produce information in a proceeding and

² *Id.* at 17048.

³ *Id.* at 17051.

what information may be required to be produced. Complaint proceedings must not be allowed to become fishing expeditions in which pipelines and other market participants can be forced to produce commercially sensitive materials that are unrelated or only tangentially related to the resolution of a complaint, but may otherwise be of interest to a party. Accordingly, the MMS should provide that only participants in a complaint proceeding can be required to produce information for purposes of resolving that complaint. Moreover, Enterprise submits that the MMS should provide parties to a proceeding with an opportunity to challenge a request for information on the grounds the information sought is irrelevant, privileged, commercially sensitive or overly burdensome.

II. BACKGROUND

With an enterprise value of more than \$20 billion, Enterprise is one of the largest publicly traded energy partnerships and is a leading North American provider of midstream energy services to producers and consumers of natural gas, natural gas liquids (“NGLs”) and crude oil, through approximately 35,000 miles of onshore and offshore pipelines. Enterprise is a major provider of the gas gathering, oil gathering and platform infrastructure that has been required to bring new Gulf of Mexico deepwater supplies to market, having developed approximately \$4 billion of new projects over the past ten years.

Currently, Enterprise is investing approximately \$1 billion in new oil and gas gathering and hub platform projects, including the Independence Trail pipeline and Independence Hub platform project located in the eastern Gulf of Mexico deepwater area. Constructed to provide market access for approximately one billion cubic feet per day of new natural gas supplies developed by a consortium of producers, the Independence Trail pipeline and Independence Hub platform are supported by commercial arrangements with four deepwater producers. These arrangements were negotiated in a collaborative manner and are prime examples of the positive

results that occur under the current light-handed offshore regulatory scheme, thereby demonstrating the wisdom of the MMS's proposal to maintain such an approach while also establishing more formal procedures for those with legitimate complaints.

In the Proposed Rule, the MMS has proposed a new part 291 in its regulations to implement complaint procedures and informal alternative processes to address allegations that a shipper has been denied open and nondiscriminatory access to a pipeline operating on the OCS. The Proposed Rule follows an Advanced Notice of Proposed Rulemaking ("Advanced Notice") issued on April 12, 2004, in which the MMS solicited comments about whether there was a need for regulations to assure open and nondiscriminatory access. On June 9, 2004, GulfTerra Energy Partners, L.P. ("GulfTerra"), Enterprise's predecessor, submitted comments in response to the Advanced Notice. In its comments, GulfTerra asked that any proposed regulations take into account the fact that the current offshore market is highly competitive and supports the development of vital infrastructure. Further, GulfTerra explained that any regulatory changes that unduly burden service providers operating on the OCS would impede the market forces that have fostered the development of key infrastructure on the OCS. Enterprise submits that the Proposed Rule generally strikes the appropriate balance between not imposing unnecessary burdens upon pipelines operating on the OCS while providing a defined regulatory process for those shippers who claim that they have been denied open and nondiscriminatory access.

III. COMMUNICATIONS

The names and mailing addresses of the persons to whom service is to be made and to whom all communications should be addressed in this proceeding are:

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IV. COMMENTS

A. The Proposed Rule Appropriately Recognizes the Highly Competitive Nature of the Offshore Market

The MMS has proposed a complaint-based process that would require complainants to identify clearly the alleged violation and how it affects the complainant, including an estimate of the alleged financial harm the complainant will suffer as a result of the alleged discrimination.⁴ The players in the OCS market are large, sophisticated companies, able to manage their commercial interests. If the MMS's proposed rules are adopted, they will have another tool at

⁴ *Id.* at 17060.

their disposal. The informal complaint process proposed provides the means for obtaining relief if discrimination or denial of access are alleged, without stifling the competitive forces that have spurred substantial infrastructure development on the OCS.

In the current OCS market, industry practices encourage vibrant competition for the development of new infrastructure projects from independent infrastructure development companies as well as producers. It has been Enterprise's experience in the negotiation of a significant number of projects on the OCS that producers had at least one competitive third party alternative and also had the ability to build the infrastructure themselves if the third party offers were unacceptable. As a result, if competitive proposals for the development of new infrastructure projects are not acceptable, producers can, and frequently do, resort to constructing their own pipelines or forming joint ventures for the ownership and operation of infrastructure assets in the offshore area. In this market, Enterprise must offer terms and conditions that meet or beat both competitors' and producers' project terms.

Long-term regulatory and commercial certainty allows for competitive negotiations resulting in rate certainty for all parties —producers and pipeline companies. Accordingly, under the current regulatory regime, industry players have been able to enter into the long-term, complex agreements that are necessary to support field development and to transport production from the producing areas to the interstate transmission grid. Perhaps the best evidence that the current light-handed regulatory scheme works is the paucity of complaints that have alleged discrimination or improper denial of service. In the absence of a demonstrable need for a heavier-handed regulatory approach, any additional burdens would outweigh whatever benefits, if any, might result. Enterprise believes that the MMS's proposed regulations have struck the appropriate balance between providing a defined regulatory process for those who might claim to

be aggrieved and ensuring that the market forces that have encouraged new development are largely undisturbed.

B. The MMS Is Right To Treat Open Access and Discrimination As Fact-Specific Concepts that Will Vary Widely from One Case to Another

The MMS states that its Proposed Rule reflects its belief that “‘open access’ and ‘nondiscriminatory access’ are fact-specific terms and their application is best left to be determined during adjudication of individual situations.”⁵ The MMS adds that when it decides complaints alleging violations of the OCSLA’s open and nondiscriminatory access, it will apply a “reasonableness standard [that] is inherently broad . . . [and] provides the flexibility necessary to address the various and unique situations that may arise.”⁶

As described in the preceding section, large, sophisticated companies active on the OCS enter into a variety of contractual arrangements to develop high-risk infrastructure to access important oil and gas reserves. It is Enterprise’s experience that while these contractual arrangements often reflect different terms from one customer to another, such different terms result from different commercial situations and not from discrimination. Tailored rates and service terms result because customers desire different levels of services with varying degrees of flexibility. Rates reflect, among other things, the estimated recoverable reserves coupled with the estimated costs and risks associated with providing the desired services. A generic “one-size fits all” definition of open access and discrimination, or the use of a rigid standard of review, would alter the underpinnings of the flexibility that has allowed market participants to balance risks and structure transactions to take into account the parties’ needs to set rates and contract terms that reflect the particular characteristics of the service being provided. Accordingly,

⁵ *Id.* at 17048.

⁶ *Id.*

Enterprise supports the MMS's proposal to treat "open access" and "nondiscriminatory access" as fact-specific terms to be developed during adjudication of individual situations.⁷

C. Enterprise Supports the Implementation of a Hotline for Informal Dispute Resolution

The MMS has proposed the use of a Hotline to allow shippers to attempt to informally resolve allegations of discriminatory access.⁸ Enterprise fully supports the use of tools that will aid parties in informally resolving disputes. To the extent costs and time can be spared by encouraging parties to use a Hotline to informally resolve disputes, Enterprise submits that the industry as a whole benefits. Enterprise notes that the informal complaint hotline procedure has been a success at FERC, where complaints are regularly resolved informally. Moreover, it is reasonable to assume that most parties would participate in an informal process due to the lower cost and faster resolution of a dispute—as evidenced by the fact that both shippers and service providers endorsed the concept when it was proposed in the Advanced Notice.⁹

D. The MMS Should Establish Standards for the Collection of Information Only From Parties in Complaint Proceedings

As currently drafted in the Proposed Rule, the MMS would have the authority "to require any lessee, operator of a lease or unit, shipper, grantee, or transporter (whether it is a shipper or not) to provide additional information that MMS believes is necessary to make a decision on

⁷ Enterprise notes that for purposes of determining whether a pipeline subject to FERC's jurisdiction under the Natural Gas Act ("NGA") has acted in a discriminatory fashion, FERC has adopted a fact-specific approach. *See, e.g., Sea Robin Pipeline Co.*, 88 FERC ¶ 61,120, at 61,314 (1999) (stating that the determination of whether there has been a violation of "the discrimination standards of the NGA or OCSLA is best made on a case by case basis, and driven by the facts existing in a particular case.") Enterprise submits that the body of FERC precedent that has developed as it has considered claims of discrimination would serve as a useful for guide for the MMS's own determinations of what constitutes discriminatory behavior.

⁸ *Id.* at 17049.

⁹ *Id.* at 17049.

whether open access or nondiscriminatory access was denied.”¹⁰ Enterprise does not object to the regulation to the extent it would provide the MMS with the authority to collect information from parties to a complaint proceeding; however, Enterprise proposes that in the Final Rule the MMS should limit such information gathering authority to entities that are parties to a complaint proceeding. In the context of gathering information to resolve a specific complaint, there is no need to have authority to seek information from any entity other than those directly involved in the complaint proceeding. Determining whether a service provider has denied a shipper open and nondiscriminatory access can be resolved on the basis of information that shippers and service providers maintain. Providing the MMS with authority to obtain information from entities who are not parties to a complaint has the potential to lead to corruption of the complaint process, resulting in complainants exerting pressure on MMS to seek highly confidential, commercially sensitive and irrelevant information from other market participants for no reason other than to gain advantage in a commercial negotiation.

Enterprise also proposes that the Final Rule provide parties with an opportunity to challenge a request for information on the grounds the information sought is irrelevant, privileged, commercially sensitive or overly burdensome to produce. In the Advance Notice, the MMS requested comments on how it should treat any collected information. In response to comments that it received, the MMS stated that “in order to encourage participation in informal complaints, it is necessary to treat all submitted information as confidential to the extent allowed by law.”¹¹ Enterprise fully supports the MMS’s recognition in its proposed rules that there must be procedures in place to protect confidential information and that confidential information once

¹⁰ *Id.* at 17054.

¹¹ *Id.* at 17055.

submitted should be protected to fullest extent allowed by law. However, confidentiality may not be enough. Just as FERC's rules provide parties with the ability to challenge a request for documents, due process requires that if an entity is ordered by the MMS to produce documents, that entity should have a right to challenge that request on the grounds that the information sought is irrelevant, privileged, commercially sensitive or would be overly burdensome to produce.¹² The MMS should provide that, when faced with such objections, it will balance the need for the information against the burdens of disclosure and production when deciding whether to uphold such objections.

For the forgoing reasons, Enterprise asks that the MMS amend its proposed regulations to add the following provisions: (1) the MMS may only request information from parties to a complaint proceeding; (2) parties that are requested to produce additional information may object to the request; and (3) in ruling on objections to requests for the production of information, the MMS will balance the need for the information to resolve the then-pending dispute against the burden on production and the commercial risk of disclosure of proprietary, commercially sensitive or privileged information.

E. The MMS Should Adopt Regulations that Provide Parties with Adequate Time to Comply with Its Orders

Under the proposed rules, if the MMS finds that a party has acted in a discriminatory fashion, the party would be subject to penalties of up to \$10,000 per day, which would begin "to accrue 60 days after the grantee or transporter receives the order to provide open and nondiscriminatory access"¹³ Enterprise submits that depending upon the capacity available and the contractual arrangements that may already be in place when the MMS issues such an

¹² See, for example, FERC's rules at 18 C.F.R. § 385.409(d) (2006).

¹³ Proposed Rule at 17062.

order, 60 days may not provide a pipeline with adequate time to comply with an MMS order. For example, if an order requires a pipeline to make facility modifications, given the high demand for service contractors on the OCS, 60 days might not be sufficient time to undertake even minor required facility modifications. Accordingly, Enterprise requests that the regulation setting forth the time frame for the imposition of penalties be revised to state that penalties will begin to accrue after a reasonable period of time to be specified by the MMS, but in no case sooner than 60 days after the MMS orders a party to provide open and nondiscriminatory access.

F. Comments on Specific Questions

With respect to the MMS's individual questions, Enterprise responds to each question as follows:

1. *Whether MMS should consider other methods of delivery assurance, e.g., electronic transmission, to satisfy parties' complaint and answer notification requirements.*

Enterprise supports the electronic transmission of complaint and answer notification requirements. Electronic transmission is less expensive and more likely to provide parties with materials on a timely basis.

2. *Whether MMS should use a formal complaint resolution method other than that proposed.*

Enterprise supports the complaint resolution proposed, with the minor modifications suggested above. Enterprise does not believe that the MMS should use a formal complaint resolution method other than that proposed. As explained more fully in Section IV.A above, a more formal complaint process would hamper, without any corresponding benefit, the competitive forces that have effectively operated to prevent anticompetitive behavior.

3. *Whether MMS's proposed treatment of OCSLA pipelines over which FERC exercises its Natural Gas Act or Interstate Commerce Act jurisdiction is adequate.*

The MMS has proposed “to defer to the FERC on pipelines under the jurisdiction of the Natural Gas Act or Interstate Commerce Act . . . MMS would not consider complaints regarding a FERC pipeline that, for examples, originates from a lease on the OCS and then transports production onshore to an adjacent state.”¹⁴ Enterprise concurs with MMS’s proposed treatment of OCSLA pipelines over which FERC exercises its Natural Gas Act or Interstate Commerce Act jurisdiction. It is unnecessary and unduly burdensome to subject pipelines to the open access requirements of two agencies. Moreover, subjecting entities to the jurisdiction of two agencies would be a source for uncertainty and possible forum shopping by complainants.

4. *Whether MMS should impose a time limit on the filing of complaints.*

A statute of limitations requiring a complaint to be brought within six months of the alleged discrimination will ensure that complaints are brought in a timely manner and that parties still possess relevant documentation and evidence.

5. *Whether an answer in response to a complaint should include specific information other than that required by the proposed rule.*

Enterprise supports the rule as written.

6. *Whether the amount of the processing fee is fair, whether the payment by electronic funds transfer is feasible, and what form of identification should be used to submit fees to MMS.*

Enterprise takes no position on the processing fee.

7. *Whether the proposed processing fees will materially affect the filing of complaints and whether the value of using the complaints process to complainants, transporters, and others of using the complaint process is fairly presented.*

Enterprise responds to questions 7 and 8 together. See below.

¹⁴ *Id.* at 17050.

8. *Whether processing fee waiver and reduction provisions should be retained.*

In response to questions 7 and 8, Enterprise does not believe that the processing fee will materially affect the filing of complaints and Enterprise does not think any provisions for fee waiver or reduction are necessary or appropriate. Whether producing oil or gas, shipping oil or gas or otherwise being engaged in business activities that might give an entity a basis to claim denial of access or discrimination on the OCS, these entities are large, sophisticated players in the oil and gas industry. A \$7,500 filing fee should not be an impediment to any entity transacting business on the OCS. Accordingly, there is no need for provision of waiver or reduced fees.

9. *Whether MMS should obtain information from persons who are not parties to a complaint.*

Enterprise does not believe that MMS needs authority to obtain information from parties who are not parties to a complaint. For reasons explained more fully in Section IV.D above, determining whether a service provider has denied a shipper open and nondiscriminatory access can be resolved on the basis of information that shippers and service providers maintain.

10. *Whether MMS should automatically stay each decision pending an appeal to the IBLA.*

Enterprise supports the rule as written.

V. CONCLUSION

For the reasons stated above, Enterprise supports the MMS's Proposed Rule to establish a complaint process for shippers transporting oil and gas on the OCS. The regulatory approach proposed by the MMS strikes the appropriate balance by not interfering with the competitive environment that exists on the OCS and not unduly burdening service providers while setting forth a process that will offer protections to those who may have legitimate claims of denial of access or discrimination. Subject to the proposed modifications set forth above, Enterprise supports the adoption of the regulations and standards set forth in the Proposed Rule.

Respectfully submitted,

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Dated: June 5, 2007